

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANGELIKA LESSNER,)	
)	
Petitioner Employee,)	2 CA-IC 2008-0002
)	DEPARTMENT B
)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
THE INDUSTRIAL COMMISSION OF)	Appellate Procedure
ARIZONA,)	
)	
Respondent,)	
)	
STATE OF ARIZONA DEPARTMENT)	
OF CORRECTIONS,)	
)	
Respondent Employer,)	
)	
STATE OF ARIZONA, DOA RISK)	
MANAGEMENT,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 98012-223868

Insurer No. 1998-00023

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

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B R A M M E R, Judge.

¶1 In this statutory special action, petitioner Angelika Lessner challenges the Industrial Commission’s decision awarding her supportive care for a psychological condition stemming from her industrial injury but declining to find a permanent psychological impairment related to that injury. We affirm the award.

Factual and Procedural Background

¶2 “On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission’s findings and award.” *Roberts v. Indus. Comm’n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). Lessner was awarded workers’ compensation benefits for physical injuries sustained after she fell into razor wire and lacerated her wrist in January 1998, while employed as a corrections officer by the Arizona Department of Corrections. In March 2000, Administrative Law Judge (ALJ) Jerry Schmidt granted Lessner’s request, filed pursuant to A.R.S. § 23-1061(J), for benefits

to treat psychological difficulties stemming from her injury. He found that Lessner suffered from post-traumatic stress disorder (PTSD) related to her industrial injury. Consequently, he awarded her medical benefits and disability compensation “until such time as her condition is determined to be medically stationary for her psychological disorder.”

¶3 In 2001, the workers’ compensation carrier, State of Arizona Department of Administration Risk Management (Risk Management), terminated Lessner’s temporary compensation and active treatment with a finding of a permanent impairment to her left wrist. Lessner requested review and, after a hearing, ALJ LuAnn Haley determined that Lessner had a permanent, eleven-percent impairment to her wrist and that her psychological condition was not stationary, requiring continuing treatment. ALJ Haley found that Lessner suffered from depression and PTSD stemming from her industrial injury.

¶4 Risk Management terminated Lessner’s benefits in July 2007, stating Lessner had no permanent disability, apparently based on an independent medical examination performed in 2004 by psychiatrist Mavis Donnelly, who determined Lessner had no current impairment from any psychological condition resulting from the industrial accident. Lessner filed a request for hearing. Donnelly and psychologist Mary Taylor Davis testified at the hearing regarding Lessner’s psychological condition. Donnelly testified that, although Lessner may have previously suffered from depression and a pain disorder due to her industrial injury, she “is now stationary from th[ose] condition[s]” and that there was “no

evidence of a permanent impairment.” Donnelly opined Lessner has “a histrionic personality” unrelated to her injury.

¶5 Davis testified Lessner did not have a histrionic personality but instead suffered from “depression and bipolar disorder” related to her industrial accident, was stationary with a permanent impairment, and required additional supportive treatment. In her decision upon hearing, ALJ Haley stated both doctors agreed Lessner’s condition was stationary and adopted Donnelly’s opinion there was no permanent psychological impairment. Thus, ALJ Haley concluded Lessner “was stable and stationary . . . from her industrially related psychological condition without additional permanent impairment” but awarded supportive psychological care. Lessner requested review and, on March 12, 2008, the ALJ issued her decision upon review affirming the decision upon hearing. This statutory special action followed.

Discussion

Issue Preclusion

¶6 Lessner first argues issue preclusion prevented ALJ Haley from “accepting Dr. Donnelly’s opinion on permanent impairment.” As we understand her argument, Lessner posits that ALJ Schmidt’s 2000 award rejected the possibility that Lessner had a histrionic personality or other psychological disorder before she sustained her injury. Therefore, Lessner reasons, ALJ Haley could not adopt Donnelly’s opinion that Lessner had a histrionic

personality unrelated to her injury and thus could not properly conclude Lessner had no permanent disability.

¶7 Issue preclusion applies in the workers' compensation context when the issue was actually litigated, a final award was entered, the parties had full opportunity to litigate the issue, and the issue was essential to the final award. *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 425, 880 P.2d 642, 645 (App. 1993). "Unless the applicability of issue preclusion involves disputed questions of fact, its applicability is a question of law for this court to determine independently." *Indus. Comm'n v. Tabor*, 201 Ariz. 89, ¶ 20, 32 P.3d 14, 17 (App. 2001). Assuming, without deciding, that whether Lessner had a preexisting psychological disorder, however characterized, was actually litigated before ALJ Schmidt, the final element of issue preclusion—that the issue was essential to the final award—is not met here for several reasons. *See Circle K Corp.*, 179 Ariz. at 425, 880 P.2d at 645.

¶8 First, in the decision upon hearing, ALJ Haley did not expressly adopt Donnelly's opinion that Lessner suffered from a histrionic personality disorder, only her opinion that Lessner's psychological difficulties "did not prevent her from working" and that there was no longer "significant evidence of depression." ALJ Haley relied on this opinion to conclude Lessner had no permanent impairment, rejecting Davis's opinion that Lessner was "impaired in her activities of daily living and with regard to her social interaction." The essence of ALJ Haley's decision upon hearing was that Lessner's psychological difficulties did not impair Lessner by causing her any current loss of function—not that her

psychological conditions had a particular etiology.¹ See *Tsosie v. Indus. Comm'n*, 183 Ariz. 539, 541, 905 P.2d 548, 550 (App. 1995) (permanent impairment is “functional loss”); see also *Capuano v. Indus. Comm'n*, 150 Ariz. 224, 226, 722 P.2d 392, 394 (App. 1986) (“Although [a] temporary disability may have been caused by an industrial incident, the medical evidence must establish the claimed, permanent disability arises from the industrial injury, rather than the natural progression of a preexisting condition.”).

¶9 ALJ Haley stated in her decision upon review, however, that she found “persuasive” Donnelly’s testimony that Lessner suffered from a histrionic personality disorder. But even if we assume that ALJ Haley meant by this equivocal language to adopt Donnelly’s opinion on that subject, or that ALJ Haley did so implicitly by finding Lessner had no permanent impairment, issue preclusion would not bar that finding. In reaching his conclusions in 2000, ALJ Schmidt considered the report of psychologist John Beck. After his 1999 evaluation of Lessner, Beck had concluded in his report that Lessner’s accident did

¹To the extent Lessner asserts ALJ Haley’s failure in the decision upon hearing to expressly find the etiology of Lessner’s psychological symptoms violates the rule announced in *Post v. Industrial Commission*, 160 Ariz. 4, 770 P.2d 308 (1988), we disagree. In *Post*, our supreme court stated an ALJ “must find on all the case’s material issues.” *Id.* at 7, 770 P.2d at 311. Lessner reads *Post* too broadly. There, the ALJ made no factual findings at all, so that “judicial review [was not] possible.” *Id.* As the court in *Post* explained, a “lack of findings on a particular issue does not invalidate an award per se.” *Id.* Instead, we will vacate an award only if “we cannot determine the factual basis of [the ALJ’s] conclusion or whether it was legally sound.” *Id.* Here, the ALJ’s finding in the decision upon hearing that Lessner’s current psychological symptoms did not impair her was the only finding required to legally support the award.

not contribute in any “substantial way” . . . to her current psychological condition” and instead she “likely . . . has a pre-existing neurosis . . . which unconsciously is causing her to perpetuate most, if not all, of her current complaints.” He further stated personality testing “showed hysteria coupled with signs of a possible underlying maladaptive, developmental personality style,” but he declined to “give her a [*Diagnosis and Statistical Manual of Mental Disorders* (4th ed. 2000) (]DSM-IV[)] diagnosis.” Beck also opined that “this prior maladaptive style did not impair [Lessner’s] earning capacity or ability to work, nor does it today.” ALJ Schmidt also considered the report of psychiatrist James Organist, who concluded that Lessner suffered from two DSM-IV mood disorders—depression and PTSD—and that her industrial accident was “the substantial contributing cause[.]” of those disorders. Organist criticized Beck’s conclusions, stating any preexisting personality disorder would have manifested itself earlier in Lessner’s life and would have made her incapable of working as a corrections officer.

¶10 ALJ Schmidt noted Beck “did not reach a diagnosis” and, as we noted above, adopted Organist’s opinion that Lessner suffered from PTSD and depression related to her industrial accident. In order to do so, however, ALJ Schmidt was not required to conclude—nor did he conclude—that Lessner had had no psychological disorder before her industrial accident. All ALJ Schmidt had to determine was whether Lessner currently had a psychological impairment related to her industrial accident. Nothing in the record suggests that Organist’s diagnosis of depression and PTSD caused by Lessner’s accidental injury and

Beck's opinion that she has a previously existing, maladaptive personality style are mutually exclusive.

¶11 Last, Donnelly's opinion was not wholly incompatible with Organist's. Although Donnelly stated she did not believe Lessner suffered from PTSD, she agreed Lessner had suffered psychological difficulties stemming from her industrial injury. Donnelly opined, however, that any depression or injury-related pain disorder had resolved. Donnelly's opinion is simply not inconsistent with ALJ Schmidt's findings and award. For these reasons, we conclude issue preclusion does not apply here.

Supportive Care Award

¶12 Lessner next contends we must set aside the award because ALJ Haley's finding that Lessner had no permanent psychological impairment is inconsistent with the award of supportive psychological care. We disagree. There is nothing inherently inconsistent in awarding supportive care for a stable industrial injury while finding there is no permanent impairment. Supportive care is "intended to maintain [a] 'relatively stable status,' rather than to improve the employee's . . . condition," once an injury has become stationary. *Continental Cas. Co. v. Indus. Comm'n*, 23 Ariz. App. 294, 296, 532 P.2d 869, 871 (1975). An injury may be stationary and require supportive care to maintain that status without also entailing permanent impairment. *See Tsosie*, 183 Ariz. at 541-42, 905 P.2d at

550-51 (award of supportive care not inconsistent with finding no permanent impairment).² Nor must an injury currently cause impairment in order to qualify for an award of supportive care—treatment may completely resolve any impairment caused by an injury without resolving the injury itself. *See Capuano*, 150 Ariz. at 226, 722 P.2d at 394 (supportive care award “designed to prevent or reduce the continuing symptoms of an industrial injury”). A supportive care award allows that treatment to continue.

¶13 Lessner additionally contends ALJ Haley’s findings may “create[] future procedural problems in this case” should Lessner file a petition to reopen her claim. She asserts these problems will arise because it is not clear whether she has a psychological condition related to her industrial injury. But the award of supportive care affirmatively answers that question. If Lessner had no such psychological condition, there would be no basis for supportive care. Although ALJ Haley’s decision is not a model of clarity, it nonetheless establishes that Lessner has a psychological condition related to her industrial accident, that the condition does not impair her, and that her status may be maintained with supportive care. A finding that Lessner also has a personality disorder is not inconsistent with those findings. Nor was it necessary for ALJ Haley to make that finding to reach the conclusions she did here. Should Lessner file a petition to reopen, she would have the

²Lessner argues *Tsosie* is distinguishable because, in *Tsosie*, “there was testimony from only one doctor, so the medical evidence did not conflict.” *See* 183 Ariz. at 541-42, 905 P.2d at 550-51. Lessner does not explain how that distinction is meaningful. Whether there are conflicts in the medical evidence or not, a supportive care award is not inconsistent with a finding of no permanent impairment.

burden of establishing that a “new, additional or previously undiscovered temporary or permanent condition” resulted from her industrial injury. A.R.S. § 23-1061(H). ALJ Haley’s decision does not foreclose her from doing so. Nor would Risk Management be precluded from asserting any such new condition results from a personality disorder unrelated to Lessner’s industrial injury.

Factual Foundation of Donnelly’s Opinion

¶14 Last, Lessner argues Donnelly’s opinion regarding permanent impairment “is not supported by substantial evidence.” Although Lessner cites no relevant case law in support of this argument, she apparently contends Donnelly’s opinion lacked a sufficient factual foundation. *See Aguilar v. Indus. Comm’n*, 165 Ariz. 172, 173, 797 P.2d 711, 712 (App. 1990) (“An accurate factual foundation is a necessary element of a legally sufficient [medical] opinion.”); *Hartford Accident & Indem. Co. v. Indus. Comm’n*, 15 Ariz. App. 177, 180, 487 P.2d 23, 26 (1971) (“[M]edical testimony may not be competent without adequate foundation.”); *see also Price v. Indus. Comm’n*, 23 Ariz. App. 1, 4, 529 P.2d 1210, 1213 (1975) (“[A]n appellate court will affirm an award of the Industrial Commission when there is substantial evidence to support the Commission’s decision.”).

¶15 Lessner proposes three reasons Donnelly’s opinion is insufficiently supported. First, she points out that Donnelly stated in her report that, when she prepared her report, she had lacked “important records,” particularly Lessner’s medical records preceding her industrial injury. This argument is unavailing because Donnelly explained she did not

require those records to reach a diagnosis and Lessner identifies no evidence in the record that suggests otherwise. ALJ Haley could, of course, properly consider this factor in deciding whether to adopt Donnelly's opinion, but the ALJ was not obliged to disregard Donnelly's conclusions because Donnelly had not reviewed Lessner's medical records from before the accident.

¶16 Lessner also suggests Donnelly's testimony lacks sufficient foundation because she had not reviewed the testimony of Lessner's counselor, Martha Nordin, given at an earlier hearing, addressing Lessner's previous PTSD diagnosis. Lessner asserts Nordin's testimony that Lessner had no mental health problems before the accident "totally undermines Dr. Donnelly's conclusion that Lessner's psychiatric problems were the result of a pre-existing histrionic personality style/disorder." Again, it is not entirely clear whether ALJ Haley adopted that conclusion. But, even assuming she did so, Lessner identifies nothing in the record suggesting that Nordin had any more access to Lessner's pre-accident medical history than did Donnelly or that Nordin's opinion carried more weight than Donnelly's. Indeed, Nordin admitted she was not "technically qualified" to make a diagnosis. Moreover, Donnelly reviewed Nordin's records and addressed Nordin's conclusions in her report.

¶17 Additionally, Donnelly testified, even if she "accepted as a fact that Ms. Lessner had [PTSD] and depression due to the . . . injury," that fact would not change her diagnosis. Donnelly included in her report Lessner's statements about her life before the

accident, noting Lessner’s low academic achievement was “predictabl[e]” given Donnelly’s diagnosis of histrionic personality. Donnelly also testified the personality disorder may not be evident “100 percent of the time.”

¶18 Last, Lessner asserts Donnelly’s testimony is flawed because she “was unable to specifically state how her opinion was based on the [DSM-IV].” Lessner complains that Donnelly could not say what the DSM-IV criteria for histrionic personality were “without getting it out” and “belittled [the DSM-IV criteria’s] usefulness.” Lessner’s argument, however, mischaracterizes Donnelly’s testimony. Donnelly stated that, due to her experience, she did not “feel a need to refer to the DSM-IV” criteria but was “absolutely in agreement with” those criteria and would “come to the same conclusion” whether she explicitly recited the DSM-IV criteria or not. Indeed, during her testimony, she offered to review the DSM-IV criteria for histrionic personality, and Lessner declined the offer. And Donnelly’s testimony and report clearly explained her Axis II diagnosis using the DSM-IV. Thus, even if, as Lessner asserts, Donnelly was required to assess Lessner using DSM-IV criteria, she had plainly done so.³

³Lessner points out that Ariz. Admin. Code R20-5-113(B) requires a physician “discharg[ing] a claimant from treatment” to “determine whether the claimant has sustained any impairment of function” and to “rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by . . . the American Medical Association in Guides to the Evaluation of Permanent Impairment (AMA Guides).” The AMA Guides, in turn, state in § 14.1 that any psychological diagnosis “needs to be established according to the *DSM-IV* criteria.” Lessner reasons, therefore, that an opinion concerning a psychological impairment must use DSM-IV criteria. Because Donnelly clearly did employ those criteria, we need not decide this issue. We observe, however, that

¶19 For the reasons stated above, we conclude there was ample factual foundation for Donnelly’s opinion that Lessner had no permanent psychological impairment, and we have no valid basis to disturb the ALJ’s decision to adopt it. *See Aguilar*, 165 Ariz. at 173, 797 P.2d at 712; *see also Noble v. Indus. Comm’n*, 140 Ariz. 571, 575, 683 P.2d 1173, 1177 (App. 1984) (“The [ALJ] resolves conflicts in medical evidence, and h[er] resolution will not be disturbed unless it is wholly unreasonable.”).

Disposition

¶20 We affirm the award.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

R20-5-113 differentiates “examin[ing]” from “treat[ing].” It may therefore be questionable whether an examination like the one Donnelly performed falls within subsection (B). Moreover, Arizona law does not require slavish adherence to the AMA Guides. *See Benafield v. Indus. Comm’n*, 193 Ariz. 531, ¶¶ 19-20, 975 P.2d 121, 127-28 (App. 1998) (AMA Guides do not “foreclose any other evidence of or means for assessing permanent impairment”).

